Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v Selangor Properties Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–196 OF 2002

ABDULL HAMID EMBONG FCJ, ABDUL MALIK ISHAK AND HASAN LAH JJCA

5 NOVEMBER 2009

Land Law — Sale of land — Order for — Document of title to land deposited with appellant — Whether act of depositing document of title must be done by registered proprietor and no one else — Whether second and third respondents were beneficial owners of land — Whether there was delay in applying for order for sale — National Land Code s 281

On 25 August 1984 the appellant bank granted Mohd Nor Rahmat, the second respondent, an overdraft facility of RM130,000. In 1985, Selangor Properites Sdn Bhd ('the first respondent'), the registered proprietor of a piece of land situated in Mukim Ulu Klang ('the land') transferred this land to the second and third respondents. For the purpose of securing the overdraft facility the second and third respondents deposited the original title deeds of the land with the appellant. On 4 January 1985, the appellant lodged a lien-holder's caveat on the land. When the second respondent defaulted in settling the outstanding sums under the overdraft facility, the appellant issued a letter of demand to the second respondent. As the second respondent failed to comply with the letter of demand, the appellant instituted legal action against him. On 12 September 1987, the appellant obtained a default judgment against the second respondent in the sum of RM101,001.80 together with interest and costs. Thereafter when the second respondent failed to settle the judgment sum the appellant filed the present originating summons seeking, inter alia, an order for the land to be sold by public auction pursuant to ss 257 and 281 of the National Land Code ('the NLC'). The High Court dismissed the appellant's application with costs. The trial judge construed s 281 of the NLC as requiring the registered proprietor, ie the first respondent, himself to do the act of depositing the document of title with the appellant bank and not anyone else. The trial judge also found that there was no transfer of ownership of the land from the first respondent to the second and third respondents and that the appellant had delayed in instituting an action for the sale of the land. In this appeal against that decision the appellant submitted that that the trial judge was in error and had

failed to adequately consider the facts and the law surrounding the whole case. A

Held, allowing the appeal with costs here and below:

(1) There was no general rule of law that required the issue document of title to be deposited by the registered proprietor himself in order to create a lien and to enter a lien-holder's caveat under s 281(1) of the NLC. The trial judge had erred in holding that the actual act of depositing must be done by the first respondent as the registered proprietor. An intention to create a lien may be gathered from the fact that the issue document title to the land was deposited with the lender as security for the loan and for no other purposes. In the present appeal, both the second and third respondents did not deny that they had deposited the land title to the land with the appellant, and the first respondent as the registered proprietor of the land had also consented to the deposit of land title as security in favour of the appellant for the second respondent's overdraft facility. In the circumstances the consent to enter the lien holder's caveat over the land was properly obtained by the appellant (see paras 10–18). B C D

(2) The trial judge had erred in finding that the second respondent's claim that they were the beneficial owners of the land was unsubstantiated. There was overwhelming evidence that the second and third respondents were the beneficial owners of the land at the time the land title was deposited with the appellant. Further, the word 'proprietor' that appears in s 281(1) of the NLC should necessarily include a beneficial owner (see paras 23–26). E F

(3) The originating summons filed by the appellant was well within the time limit permitted and stipulated by law as provided for in s 21(1) of the Limitation Act 1953 and consequently the issue of delay that was raised by the trial judge had no merit at all (see paras 27–28). G

[Bahasa Malaysia summary

Pada 25 Ogos 1984 perayu memberikan kepada Mohd Nor Rahmat, responden kedua, suatu kemudahan overdraf sebanyak RM130,000. Pada 1985, Selangor Properties Sdn Bhd ('responden pertama'), pemilik berdaftar sebidang tanah yang terletak di Mukim Ulu Klang ('tanah tersebut') memindah milik tanah tersebut kepada responden pertama dan kedua. Bagi tujuan menjamin kemudahan overdraf tersebut, responden kedua dan ketiga menyerahkan surat ikatan hak milik tanah tersebut kepada perayu. Pada 4 Januari 1985, perayu memasukkan kaveat pemegang lien terhadap tanah tersebut. Apabila responden kedua gagal menyelesaikan jumlah yang tertunggak di bawah kemudahan oeverdraf tersebut, perayu mengeluarkan notis tuntutan kepada responden kedua. Disebabkan responden kedua gagal H I

mematuhi notis tuntutan tersebut, perayu mengambil tindakan undang-undang terhadapnya. Pada 12 September 1987, perayu memperoleh penghakiman ingkar terhadap responden kedua sejumlah RM101,001.80 bersama faedah dan kos. Kemudiannya, apabila responden kedua gagal menyelesaikan jumlah penghakiman tersebut, perayu memfailkan saman pemula ini, memohon, antara lain, suatu perintah agar tanah tersebut dijual melalui lelongan awam berikutan ss 257 dan 281 Kanun Tanah Negara ('KTN'). Mahkamah Tinggi menolak permohonan perayu dengan kos. Hakim bicara mentafsirkan s 281 KTN sebagai menghendaki pemilik berdaftar, iaitu responden pertama sendiri harus menyerahkan surat ikatan hak milik kepada perayu dan bukannya orang lain. Hakim bicara juga memutuskan bahawa tiada penukaran hak milik ke atas tanah tersebut daripada responden pertama kepada responden kedua dan ketiga dan bahawa perayu lambat memulakan tindakan penjualan tanah tersebut. Dalam rayuan terhadap keputusan tersebut, perayu menghujah bahawa hakim bicara telah silap dan gagal mempertimbangkan fakta-fakta dan undang-undang keseluruhan kes tersebut dengan wajar.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Tiada peraturan perundangan am yang menghendaki surat ikatan hak milik diserahkan oleh pemilik berdaftar sendiri bagi mewujudkan sesuatu lien dan bagi memasukkan satu kaveat pemegang lien di bawah s 281(1) KTN. Hakim bicara telah khilaf apabila memutuskan bahawa penyerahan mesti dilakukan sendiri oleh responden pertama sebagai pemilik berdaftar. Niat untuk mewujudkan satu lien boleh ditentukan daripada fakta bahawa surat ikatan hak milik tanah diserahkan kepada pemiutang sebagai jaminan untuk pinjaman dan bukan untuk tujuan yang lain. Dalam rayuan ini, kedua-dua responden kedua dan ketiga tidak menafikan bahawa mereka telah menyerahkan hak milik tanah tersebut kepada perayu, dan responden pertama sebagai pemilik berdaftar tanah tersebut juga bersetuju dengan penyerahan hak milik tanah tersebut sebagai jaminan kepada perayu untuk kemudahan overdraf responden kedua. Dalam keadaan ini, persetujuan untuk memasukkan kaveat pemegang lien terhadap tanah tersebut dibuat dengan teratur oleh perayu (lihat perenggan 10–18).

(2) Hakim bicara telah khilaf dalam memutuskan bahawa dakwaan responden kedua bahawa mereka merupakan pemilik benefisial tanah tersebut tidak berasas. Terdapat keterangan yang mencukupi bahawa responden kedua dan ketiga merupakan pemilik benefisial tanah tersebut ketika hak milik tanah tersebut diserahkan kepada perayu. Selanjutnya, perkataan 'proprietor' yang tertera dalam s 281(1) KTN harus juga bermaksud pemilik benefisial (lihat perenggan 23–26).

(3) Saman pemula yang difailkan oleh perayu adalah dalam tempoh masa yang ditetapkan dan diperuntukkan oleh undang-undang seperti dalam s 21(1) Akta Had Masa 1953 dan oleh itu isu kelewatan yang dibangkitkan oleh hakim bicara tiada merit langsung (lihat perenggan 27–28).]

Notes

For cases on order for sale of land, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4295–4397.

Cases referred to

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, FC (refd)

Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266, FC (refd)

Manilal & Sons (M) Sdn Bhd v Mahadevan & Anor [1986] 1 MLJ 357, PC (refd)

Mercantile Bank Ltd v The Official Assigneee of the Property of How Han Teh [1969] 2 MLJ 196, HC (refd)

Paramoo v Zeno Ltd [1968] 2 MLJ 230, FC (refd)

Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Sdn Bhd & satu lagi (No 1) [1996] 3 MLJ 409, CA (refd)

Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)

United Asian Bank Bhd v Personal Representative of Roshammah (Decd) & Ors [1994] 3 MLJ 327; [1994] 3 CLJ 681, HC (refd)

United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors [1976] 1 MLJ 169, FC (refd)

Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614, SC (refd)

Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor [1967] 2 MLJ 104, HC (refd)

Legislation referred to

Limitation Act 1953 s 21(1)
National Land Code ss 257, 258, 259, 281, 281(1), 343, 343(3), Chapter 6
Rules of the High Court 1980 O 42

Appeal from: Originating Summons No MT1–24–772 of 1996 (High Court, Shah Alam)

JK Lim (Soo Thien Ming & Nashrah) for the appellant.
Teoh Choon Hui (Skrine) for the first respondent.
V Rajadevan (Rajadevan & Associates) for the second and third respondents.

Abdul Malik Ishak JCA (delivering judgment of the court):

THE UNDISPUTED FACTS

[1] The appellant (Perwira Affin Bank Bhd) granted an overdraft facility of RM130,000 to the second respondent (Mohd Nor Rahmat) on the strength of a letter of offer dated 25 August 1984 between the appellant and the second respondent. It was this overdraft facility that led to the filing of these proceedings in the High Courts at Kuala Lumpur and Shah Alam which culminated in this appeal before us.

[2] Now, the first respondent (Selangor Properties Sdn Bhd) was the registered proprietor of a piece of land known and identified as HS(D) No 14830, Lot No 3859, PT 1712, Mukim Ulu Klang ('the land'). In 1985, the first respondent transferred the land to the second respondent and the third respondent (Azizam bt Hashim). Legally speaking, the transfer of the land to both the second and third respondents made them to be the beneficial owners of the land.

[3] Acting in abundance of caution and for the purpose of securing the overdraft facility, both the second and third respondents then proceeded to deposit the original title deeds of the land with the appellant so that the appellant could create a lien over the land. True enough, the appellant then proceeded to lodge a lien-holder's caveat on the land at the land office and this was done on 4 January 1985.

[4] Somehow, the second respondent defaulted in settling the outstanding sums to the appellant under the overdraft facility. The appellant through its solicitors then issued a letter of demand to the second respondent. This letter of demand was dated 25 February 1987.

[5] The second respondent failed to comply with the appellant's letter of demand. This prompted the appellant to institute legal action against the second respondent in the Kuala Lumpur High Court vide Civil Suit No D2–23–1662 of 1987. The appellant succeeded, on 12 September 1987, to obtain a default judgment against the second respondent in the sum of RM101,001.80 together with interests and costs.

[6] Armed with this default judgment, on 22 December 1987, the appellant's solicitors served a letter of demand on the second respondent's solicitors demanding that the second respondent to settle the judgment sum.

[7] Again the second respondent failed to settle the judgment sum. This time the appellant filed an originating summons on 13 December 1996 at the Shah Alam High Court seeking for certain reliefs, inter alia, a declaration that both the second and third respondents are the proprietors of the land and for an order that the land be sold by public auction pursuant to ss 257 and 281 of the National Land Code 1965 ('the NLC').

[8] At the Shah Alam High Court, the first respondent did not file any affidavit to oppose the appellant's originating summons. Indeed during the hearing of the originating summons, the first respondent's counsel confirmed that the first respondent was not opposing the originating summons on condition that the appellant would not ask for costs against the first respondent. To this request, the appellant agreed.

[9] Unfortunately, on 11 February 2002, the Shah Alam High Court dismissed the appellant's originating summons with costs. Aggrieved by that decision, the appellant now appeals to this court.

ANALYSIS

[10] We have anxiously read the written grounds of judgment of the learned judge of the Shah Alam High Court and we are compelled to conclude that the learned judge was in error and had failed to adequately consider the facts and the law surrounding the whole case. We say that the land title to the land need not be deposited by the first respondent as the registered proprietor in order to create a lien. We categorically say that there is no general rule of law that says that the issue document of title need to be deposited by the registered proprietor himself and that would be the first respondent in order to create a lien and to enter a lien-holder's caveat under s 281(1) of the NLC.

[11] Chapter 6 of the NLC wherein s 281(1) of the NLC is housed relates to 'Liens' generally. Section 281(1) of the NLC reads as follows:

> 281 Creation and effect, of liens
>
> (1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body —
>
> (a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien-holder's caveat; and
>
> (b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.

[12] We say that an intention to create a lien may be gathered from the fact that the issue document of title to the land is deposited with the lender as a security for the loan and for no other purposes. If authority is required for this simple proposition of the law, the case of *Paramoo v Zeno Ltd* [1968] 2 MLJ 230, a decision of the then Federal Court would suffice. Then there is the case of *Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor* [1967] 2 MLJ 104, at p 105, where Raja Azlan Shah J (as His Majesty then was) observed that the intention to create a lien may be inferred from all the relevant circumstances of the case.

Halsbury's Laws of England, Vol 28,(4th Ed, Reissue) at p 352 defines a 'lien' in this way:

> In its primary or legal sense 'lien' means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied.

[13] With respect, the learned judge of the Shah Alam High Court had erred by holding that under s 281 of the NLC, the land title must be deposited by the first respondent who was the registered proprietor and not by anyone else. His Lordship relied heavily on the case of *Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Sdn Bhd & satu lagi (No 1)* [1996] 3 MLJ 409, a decision of this court, and came to the conclusion that the lien in question was not a valid lien and the lien-holder's caveat in question was also not valid and the court could not enforce the lien. The correct position of the law has been re-stated and clarified by the Federal Court recently in the case of*Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121 with a strong coram of Abdul Hamid Mohamad Chief Justice, Abdul Aziz Mohamad and Azmel Ma'amor FCJJ. His Lordship Abdul Hamid Mohamad Chief Justice wrote an interesting judment with Azmel Ma'amor FCJ concurring. While His Lordship Abdul Aziz Mohamad FCJ wrote a concurring separate judgment. For this exercise, we shall refer to the judgment of Abdul Aziz Mohamad FCJ where at p 188 His Lordship had this to say:

> [146] Subsection (1) of s 281 is an enabling or empowering provision. It enables or empowers the registered proprietor to deposit his issue document of title with any person or body as security for a loan. It does not lay down the procedure for or the manner of depositing. It ought not to be construed as requiring that the registered proprietor himself must do the act of depositing. It is his will that is important. If he wills that the document of title be deposited with a person or body as security for a loan and it is so deposited, then it is he who has exercised his power under sub-s (1). He wills

> the depositing if he instructs or authorises it or consents to it, and the actual act of depositing may be done by someone else. That would have been my answer to Question No 4. It follows that my answer to Question No 5 would have been a negative one.

[14] Continuing somewhere in the middle of para 147 of the same page and spilling over to p 189, His Lordship Abdul Aziz Mohamad FCJ had this to say:

> Having received the full purchase price, there could be no doubt that, at the time when they parted with the issue document of title in July 1981, they were not concerned with what was done subsequently with it. They had no more interest in it and were indifferent to what might be done with it. They no longer had any will to exercise with regard to it. Therefore if their consent had been sought for it to be deposited with Hong Leong, the chances were that, as may be implied from what was said in that affidavit several years later, they would have automatically given their consent.

[15] In the present appeal before us, both the second and the third respondents did not deny that they had deposited the land title to the land with the appellant.

[16] It must be borne in mind that the first respondent as the registered proprietor had also consented to the deposit of the land title as security in favour of the appellant for the second respondent's overdraft facility. The following facts germane to the occasion at hand must be emphasised:

(a) that the first respondent as the registered proprietor was joined as a party to the originating summons filed by the appellant at the Shah Alam High Court and the first respondent saw it fit not to file any affidavits stating that they did not give any consent to the deposit of the land title with the appellant or to the creation of the lien-holder's caveat;

(b) that the first respondent too did not object to any of the averments by the appellant particularly to para 3 of the appellant's supporting affidavit wherein it was asserted that the first respondent had authorised the second and third respondents to deposit the land title to the land and to the creation of the lien-holder's caveat by the appellant; and

(c) that the first respondent's counsel who appeared before the learned judge of the Shah Alam High Court on 24 October 2001 did not register any objection that an order for sale be granted to the appellant in respect of the land.

[17] With these background facts, we are constrained to hold that consent was properly obtained by the appellant to enter the lien-holder's caveat over the land. We too hold that the first respondent had given due authority to both the second and third respondents to deposit the title to the land with the appellant for purposes of invoking the provisions of s 281 of the NLC.

[18] A lien is said to be similar to an equitable mortgage where the lien-holder retains the issue document of title together with the duplicate of the registered lease or a copy of the issue document of title issued under s 343(3) of the NLC. And in such a situation, the interest secured would be akin to that of a co-proprietor. The deposit of the issue document of title must have been made with the intention that the deposited document would serve as a security for the loan and that the loan must not be a registered charge but rather an unregistered interest recognised by the NLC. It is at this point of time that the lien creates what is known as an 'equitable' interest in the land or lease and that would legally give the lien-holder the right to enter a lien-holder's caveat which would definitely trigger a statutory interest.

[19] Once a lien-holder's caveat is entered, the lien-holder becomes a secured creditor. This is a very important factor to be reckoned with in the subsequent bankruptcy proceedings of the borrower (*United Asian Bank Bhd v Personal Representative of Roshammah (Decd) & Ors* [1994] 3 MLJ 327; [1994] 3 CLJ 681).

[20] It must be borne in mind that the lien-holder who retains possession of the issue document of title or the duplicate lease or even a copy of the issue document of title may feel free to enter the lien-holder's caveat at any time during the currency of the loan without losing priority over subsequent purchasers of the land or lease — the subject matter of the lien. See *Mercantile Bank Ltd v The Official Assigneee of the Property of How Han Teh* [1969] 2 MLJ 196.

[21] According to s 343 of the NLC, a lien can be created over an alienated land or even over a registered lease or even in an undivided share in an alienated land. And the best remedy available to the lien-holder would be, firstly, to obtain a judgment debt under O 42 of the Rules of the High Court 1980 for the amount due and, secondly, to apply to the court for an order for sale of the land or the registered lease pursuant to the provisions of ss 257–259 of the NLC.

[22] Next, we are constrained to hold that the learned judge of the Shah Alam High Court had erred in finding that there was no transfer of ownership of the land from the first respondent to the second and third

respondents and for that reason is Lordship wrongly held that the claim that the second and third respondents were the beneficial owners of the land was unsubstantiated. A

[23] We categorically say that the first respondent consented to depositing the title to the land with the appellant. Likewise, we also say that the deposit of the title to the land by both the second and third respondents as beneficial owners of the land to the appellant was sufficient for the purpose of creating a lien and entering a lien-holder's caveat pursuant to s 281(1) of the NLC. B

[24] There is overwhelming evidence to show that the second and third respondents were the beneficial owners of the land at the time the land title was deposited with the appellant. At this juncture, a quick recital of the available evidence would be sufficient: C

(a) Exhibit TKH3 annexed to encl 2 which was the appellant's supporting affidavit contained letters from the first respondent to the appellant in reply to queries with regard to the transfer of the land from the first respondent to the second and third respondents. In the first respondent's letter dated 9 June 1986, the first respondent informed the appellant that their record showed that the first respondent had already transferred the land to the second and third respondents in 1985 and as such they have no further interest in the land. Again, in the first respondent's letter dated 28 August 1989, the first respondent informed the appellant that as far as the first respondent was concerned, the land had been transferred. D E F

(b) It must be recalled to mind that the first respondent was joined as a party to the proceedings but had not raised any objections against a declaration being granted by the High Court to declare that the second and third respondents were the owners of the land.

(c) It must also be recalled to mind that both the second and third respondents did not dispute in their affidavits that they were the owners of the land. G

[25] We have perused through s 281(1) of the NLC with a fine toothcomb and we say that the word 'proprietor' that appears therein should necessarily include, to all intents and purposes, a beneficial owner. The equitable doctrine of a bare trustee applies in this country. And under the doctrine of a bare trustee, in the context of a valid contract, the vendor is a bare trustee and, consequently, all the rights in the land passes to the purchaser in equity as beneficial owner. See *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614 (SC); *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 (FC); and *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169 (FC). H I

[26] Finally, in regard to the issue of delay that was raised by the learned judge of the Shah Alam High Court, we have this to say. That the appellant was within time to file the originating summons. None of the respondents have ever raised the so-called issue of delay or that they were prejudiced in their affidavits. Had they done so, the appellant would certainly have responded and explained the reasons as to why the delay occurred, if any.

[27] Be that as it may, the originating summons that was filed at the Shah Alam High Court was well within the time permitted and stipulated by law as provided for in s 21(1) of the Limitation Act 1953 (Revised 1981) and, consequently, the issue of delay has no merit at all.

[28] Section 21(1) of the Limitation Act 1953 (Revised 1981) enacts as follows:

> 21 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

[29] The words 'other charge on land' that appear in the above mentioned section would refer to other encumbrances to which the land is subjected to and that would necessarily include an equitable charge or lien, statutory or equitable, which arises as a result of depositing a title deed with the lender (*Manilal & Sons (M) Sdn Bhd v Mahadevan & Anor* [1986] 1 MLJ 357 (PC); and *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 (FC)).

CONCLUSION

[30] For the reasons adumbrated above, we unanimously allowed the appeal with costs here and below. We also gave an order in terms of all the prayers sought for by the appellant in the originating summons dated 13 December 1996. We set aside the decision of the learned judge of the Shah Alam High Court. We fixed tentatively the date of the auction on 1 July 2009.

Appeal allowed with costs here and below.

Reported by Kohila Nesan